

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

FRANK DOUGLAS HENDERSON,

Defendant-Appellant.

UNPUBLISHED

January 27, 2004

No. 244217

Ingham Circuit Court

LC No. 01-077092-FC

Before: O'Connell, P.J., and Wilder and Murray, JJ.

PER CURIAM.

Defendant appeals by right his conviction of armed robbery, MCL 750.529, following a jury trial. We affirm.

I. Facts and Proceedings

Defendant's conviction arises out of a robbery of a Subway restaurant in Lansing around 9:30 p.m. on August 7, 1998. Robert Cartwright, the only employee working at the Subway at the time of the robbery, testified that after defendant entered the restaurant, he approached Cartwright, put his hand under his shirt, said he had a gun, and told Cartwright to go to the cash registers and take the money out of the drawer, which Cartwright did. As Cartwright removed the money, defendant told the two customers in the restaurant to stop looking at him or he would shoot them. After taking the money, defendant ran around the counter and out of the restaurant, telling those inside not to follow him.

Cartwright also testified that in 2000, he identified the robber in a photo array presented to him by Detective Verne Read of the Lansing Police Department. Cartwright stated that he recognized the robber without a doubt in his mind. Later, he recognized the same individual at a district court hearing. He identified defendant as the individual he recognized in the photo array and the person he saw at the district court hearing.

Michael Marciniak, one of the customers in Subway that evening, testified that while he was eating, he saw defendant behind the counter with Cartwright while the cash register drawer was open. Because he found the situation unusual, Marciniak tried to figure out what was happening. Defendant then told Marciniak to stop staring at him. Marciniak, however, continued to stare, and defendant told him to put his head on the table or he would shoot him.

Marciniak complied with defendant's order. He then heard defendant say that he would shoot anyone who called the police or followed him after he left the restaurant.

Marciniak testified that during the robbery, he sat approximately five to seven feet away from the cash register and could clearly see defendant's face. Marciniak further testified that in 2000, he identified the perpetrator of the robbery in a photo array shown to him by Detective Read. Marciniak later saw the same individual at a district court proceeding. According to Marciniak, defendant was the individual he recognized in the photograph and at the prior court proceeding as the robber.

Jennifer Gray, the third individual in the restaurant that night, testified that she was at the restaurant talking to Cartwright, who then was her boyfriend, when a man came in and asked Cartwright where the bathroom was located. After she saw the man walk toward the back of the restaurant, she saw the man behind the counter asking for money. The man told Gray and the other customer in the restaurant to stop looking at him or he would shoot them. He also ordered Gray to lay her head on the table. After getting the money, the man left the restaurant. Gray described the robber as an African-American male in his thirties, approximately five feet, ten inches tall. She said he wore a baseball cap and staggered when he walked, as though he slid one foot behind the other. She could not identify defendant as the robber.

Detective Verne Read testified that while investigating another crime in 2000, a woman he interviewed named defendant as the perpetrator of a robbery of a Subway on Grand River Avenue in Lansing. She refused to provide her name and did not want to become involved. In researching the matter, Detective Read verified that the Subway the woman mentioned had been robbed around the time she indicated. He then compiled a series of photographs of individuals with characteristics similar to defendant's that included defendant's photograph. Detective Read met with Marciniak in December 2000 and showed him the array, and Marciniak identified defendant as the robber. Approximately one month later, Read met with Cartwright, who also identified defendant as the perpetrator when shown the array. Read did not present the array to Gray because she indicated that she could not make a positive identification.

Defendant testified that he did not commit the robbery. After learning about the case against him in February 2001, he contacted numerous individuals in an effort to determine his whereabouts on August 7, 1998, but was not successful. Defendant stated that he is five feet, ten inches tall. Before the date of the robbery, defendant injured himself while working at Target and suffered a pinched nerve in his back. Defendant denied asking Heather Otto, his ex-girlfriend, to provide him with an alibi for the time of the robbery or implicate another individual in the crime. Defendant testified that he did not know who told the police that he had committed the robbery.

The jury convicted defendant of armed robbery as charged. Subsequently, defendant filed a motion for a new trial in which he argued that Heather Otto was the "confidential informant" referred to by Detective Read and that Detective Read's trial testimony that he did not know her name was false. Defendant supported his argument with an affidavit from Otto in which she stated that she falsely told Detective Read that defendant was the robber because she was mad at defendant for personal reasons. On July 11, 2002, the trial court held an evidentiary hearing on defendant's motion. Otto testified to the information provided in her affidavit and asserted that she lied when she told Detective Read that defendant committed the robbery. She

said that she did not previously tell the police that she lied because a detective had threatened to file charges against her and she was afraid.

Barry Gaukel, an arson investigator with the Lansing Fire Department, testified that he accompanied Detective Read to interview Otto regarding an arson investigation. He testified that although they questioned Otto regarding defendant's involvement in the arson, Otto did not give them any information about the Subway robbery. Approximately four or five months later, while interviewing a different woman regarding defendant's possible involvement in a home invasion and the arson, the woman mentioned that defendant was involved in the Subway robbery.

Detective Read also testified that Otto did not mention the Subway robbery when he and Inspector Gaukel interviewed her regarding defendant's possible involvement in the arson. He said that they encountered the unnamed woman while investigating a home invasion. The woman was not willing to provide her name to Detective Read. She said that she did not know anything about the arson or home invasion, but that Detective Read should look into the robbery at Subway if he wanted information on a crime defendant had committed. Detective Read further testified that although he attempted to interview Otto after defendant named her in an alibi notice, Otto did not appear at their scheduled appointment. He said that when he called to schedule the interview, he urged Otto to come to the station and tell the truth about what happened, but that he did not threaten her.

The trial court found the officers' testimony credible and rejected Otto's testimony. Additionally, the trial court found that the issue was "peripheral" because the defense knew for at least one year that a confidential informant existed but did not pursue the issue. Additionally, defendant was convicted on the basis of eyewitness testimony, not information provided by the informant. Accordingly, the trial court denied defendant's motion. On August 7, 2002, the trial court sentenced defendant to six to twenty years' imprisonment. This appeal followed.

II. Standards of Review

Although we generally review claims of prosecutorial misconduct case-by-case to determine whether the defendant was denied a fair trial, we review an unpreserved claim of prosecutorial misconduct to determine whether a plain error occurred that affected the defendant's substantial rights. *People v Hicks*, ___ Mich App ___, ___ NW2d ___ (2003), citing *People v Bahoda*, 448 Mich 261, 267; 531 NW2d 659 (1995); *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000), citing *People v Carines*, 460 Mich 750, 761-762; 597 NW2d 130 (1999).

"We review jury instructions in their entirety to determine if error requiring reversal occurred. . . . The instructions must not be "extracted piecemeal to establish error." . . . Even if the instructions are somewhat imperfect, reversal is not required as long as they fairly presented the issues to be tried and sufficiently protected the defendant's rights." *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001) (citations omitted).

We review for an abuse of discretion the trial court's decision to deny a motion for a new trial. *People v Libbett*, 251 Mich App 353, 358; 650 NW2d 407 (2002), citing *People v Jones*, 236 Mich App 396, 404; 600 NW2d 652 (1999). "A trial court may grant a new trial to a criminal defendant on any basis that would support reversal on appeal, or because it believes that

the verdict has resulted in a miscarriage of justice.” *Jones, supra*, citing MCR 6.431(B). However, we review unpreserved claims of error to determine whether a plain error affecting the defendant’s substantial rights occurred. *Carines, supra*.

III. Analysis

Defendant first asserts that the prosecution violated his due process rights by arguing facts not in evidence. We disagree.

During closing arguments, the prosecutor contended that Gray’s testimony describing the robber having staggered as he walked was consistent with defendant’s testimony that he pinched a nerve in his back. The prosecutor argued:

I think the most important part of her testimony, though, had to do with his walk He kind of walked like this and he would drag a leg. In other words, one leg seemed to be okay but the other one was injured somehow. Why is it important? You remember what the [d]efendant told you? At that time, he had a pinched nerve in his back. He was going to Doctor Jakubiak and a couple of other doctors for treatment. I asked him, where was the pain? He said, in my lower back. Now, would a pinched nerve in your lower back affect the way your leg works? If any of you have ever had a pinched nerve in your lower back you’ll know that it does, or it can. So the significance of Jennifer Gray’s testimony is that it confirms not only Cartwright and Marciniak, it also coincides with what the Defendant told you about his back condition.

Defendant did not object to this argument during trial. Because this issue is unpreserved, our review is limited to determining whether a plain error occurred that affected defendant’s substantial rights. *Hicks, supra*. Prosecutors may not state facts that are unsupported by the evidence, but they may freely argue the evidence and all reasonable inferences arising from the evidence related to the theory of the case. *Schutte, supra* at 721, citing *Bahoda, supra* at 282; *People v Knowles*, 256 Mich App 53, 60; 662 NW2d 824 (2003).

Here, there is no specific evidence to support the prosecutor’s assertion that a pinched nerve can affect a person’s gait. Nevertheless, it is not beyond the common experience of many jurors that a pinched nerve can cause pain to radiate down the leg and possibly affect one’s gait. Therefore, it was not unreasonable for the prosecutor to argue to the jury that while Gray could not positively identify defendant in court or by looking at a photo array, it could permissibly infer from defendant’s testimony that he had a pinched nerve at that time that Gray had in fact observed defendant walking in the Subway as he suffered the effects of that pinched nerve.

Even if this argument was made in error, the prosecutor’s statement does not require reversal because the trial court instructed the jury that the attorneys’ statements are not evidence and that the jury “should only accept things the lawyers say that are supported by the evidence or by [the jurors’] own common sense and general knowledge.” *Schutte, supra* at 721-722. Moreover, “[j]urors are presumed to follow instructions and instructions are presumed to cure most errors.” *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003) (citations omitted). Accordingly, defendant has failed to show that the prosecutor’s statement affected his substantial rights.

Defendant next argues that the trial court erred by rejecting his request for a special jury instruction concerning the unreliability of eyewitness identification based on *People v Anderson*, 389 Mich 115; 205 NW2d 461 (1973). We disagree. Defendant argued at trial that the standard jury instruction regarding eyewitness identification does not completely address the issues addressed by our Supreme Court in *Anderson* and asked the trial court to read a special instruction incorporating specific statements from *Anderson*, in light of the importance of eyewitness identification in defendant's case. The trial court rejected defendant's request, however, and read an instruction virtually identical to Criminal Jury Instruction (CJI) 7.8, which it stated was "intended to cover the ground that the defense wants to cover with this proposed special instruction."

The trial court did not err. "*Anderson, supra*, involved constitutional requirements for evidence based on pretrial identification procedures to be admissible at trial. . . . *Anderson* does not require any special jury instruction regarding the manner in which a jury should treat eyewitness identification testimony." *People v Cooper*, 236 Mich App 643, 656; 601 NW2d 409 (1999). See also *People v Carson*, 220 Mich App 662, 678; 560 NW2d 657 (1996), adopting in relevant part *People v Carson*, 217 Mich App 801, 807; 553 NW2d 1 (1996) (stating that CJI 7.8 reflects the concerns addressed in *Anderson* and apprises the jury of proper considerations regarding eyewitness identifications). Moreover, the jury instructions as a whole, including the trial court's instruction on eyewitness identification, informed the jury of the issues in this case and sufficiently protected defendant's rights. See *Aldrich, supra*.

To the extent defendant argues that the trial court's refusal to read the requested instruction infringed on his constitutional right to present a defense, we note that defendant has not properly preserved this argument for our review because he failed to include it in his statement of questions presented. *Busch v Holmes*, 256 Mich App 4, 12; 662 NW2d 64 (2003). Additionally, defendant abandoned this issue by failing to sufficiently brief its merits. *FMB-First Michigan Bank v Bailey*, 232 Mich App 711, 717; 591 NW2d 676 (1998).

Finally, defendant argues that the trial court erred by denying his motion for a new trial. We disagree. Defendant claims that Detective Read and Inspector Gaukel failed to obtain and provide defendant the informant's name, depriving defendant of the opportunity to interview the individual and infringing on his constitutional right to present a defense.¹ We first note that defendant raised an entirely different argument in his motion for a new trial. Rather than arguing that the officers violated his constitutional rights by failing to provide this evidence, defendant argued that Detective Read knew that Otto was the informant; that Detective Read's testimony to the contrary was untruthful; and that preparing a false police report and providing false testimony "materially affect[ed] [d]efendant's right to a fair trial and right to confront his accuser."

¹ Plaintiff addresses this issue in terms of whether the prosecution violated the res gestae statute, MCL 767.40a, by failing to disclose the identity of the confidential informant. However, as the prosecution notes, "[a] res gestae witness is a person who witnesses some event in the continuum of a criminal transaction and whose testimony will aid in developing a full disclosure of the facts." *People v Gadomski*, 232 Mich App 24, 33; 592 NW2d 75 (1998), quoting *People v O'Quinn*, 185 Mich App 40, 44; 460 NW2d 264 (1990). Here, however, no evidence exists that the confidential informant witnessed any part of the criminal transaction.

Accordingly, defendant did not properly preserve the argument he raises on appeal, and our review is limited to determining whether a plain error occurred that affected defendant's substantial rights. *Carines, supra*.

Defendant has not demonstrated that a plain error occurred. Although defendant suggests that the police lost or destroyed evidence relevant to defendant's case, the testimony does not support defendant's assertion. Detective Read testified at the evidentiary hearing that the confidential informant refused to disclose her name and that when he prepared his report, he could not recall the address where they interviewed the individual. Additionally, if Detective Read had obtained the informant's name, defendant has not shown that the police would be required to disclose it. See *People v Underwood*, 447 Mich 695, 703-707; 526 NW2d 903 (1994) (discussing the conditions under which a defendant is entitled to information concerning a confidential informant). Defendant also fails to show that the alleged error affected his substantial rights. Two individuals identified defendant as the perpetrator of the crime at trial and the description provided by the third eyewitness generally matched defendant's appearance. If defendant learned the identity of the informant and the informant recanted at trial, the testimony of the three witnesses to the crime would still have sufficiently supported defendant's conviction.

Affirmed.

/s/ Peter D. O'Connell
/s/ Kurtis T. Wilder
/s/ Christopher M. Murray